

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM**

EXECUTIVE SUMMARY FOR ACTION ON RULE

Agenda # III.B.1.

Agenda Item Summary: The Department requests that the Board initiate rulemaking to repeal and amend administrative enforcement and penalty calculation procedures specified in current rules and to adopt new rules that describe a standard penalty calculation process that will be used under all environmental laws administered by the Department.

List of Affected Rules: Amend ARM 17.24.132, 17.24.133, 17.24.134, 17.24.136, 17.24.1206, 17.24.1211, 17.24.1218, 17.24.1219, 17.24.1220, 17.56.101, 17.30.2001, and 17.24.2003, repeal 17.24.1212, 17.30.2005, 17.30.2006, and 17.38.606, and adopt new rules I through VII.

Affected Parties Summary: The proposed rule amendments, repeals and adoptions would affect all parties for which the Department calculates and assesses a penalty.

Scope of Proposed Proceeding: The Department requests that the Board initiate rulemaking and conduct a public hearing to consider the proposed amendments, repeals and new rules. Because some of the rules amended and repealed in this notice are Department rules, this notice serves as a concurrent notice for rules amended and repealed under the Department's authority.

Background: The 59th Montana Legislature passed HB 428 and HB 429 that standardized the administrative enforcement procedures and the penalty calculation process for the environmental laws administered by the Department. Previous enforcement procedures specified in the Title 82 reclamation laws (coal, metal mines and opencut) required a two-step process to assess an administrative civil penalty: (1) issuance of a Notice of Violation and Statement of Proposed Penalty followed by a 20-30 day opportunity to appeal, and (2) issuance of a Findings of Fact, Conclusions of Law and Order. HB 428 amended the enforcement procedures in the Title 82 reclamation laws to make them similar to the majority of the other laws administered by the Department under Title 75. The new standard process to assess an administrative penalty under the reclamation laws is a one-step process that requires the issuance of a Notice of Violation and Administrative Penalty Order, followed by a 30-day opportunity to appeal.

Prior to the passage of HB 429, some environmental laws specified factors that must be considered when calculating a penalty, but these factors varied between the different laws. Some environmental laws did not contain any factors or guidance on how to calculate penalties. As a result of this inconsistency, the Department uses a variety of rules, state policies or federal policies to calculate a penalty under any specific law. HB 429 amended each of the environmental laws for which the department has penalty authority to repeal the existing penalty factors, and created new law that standardized the factors the department must consider for penalty calculations.

The proposed repeal and amendment of rules is necessary to eliminate or modify existing

administrative enforcement and penalty calculation procedures and allow the implementation of HB 428 and HB 429. The proposed new rules are necessary to describe a standard penalty calculation process that will implement HB 429.

HB 429 identified the following factors that must be considered in penalty calculations: nature, extent, gravity, circumstances, good faith and cooperation, amounts voluntarily expended to mitigate the violation, history of violation, economic benefit, and other matters as justice may require. The penalty calculation process proposed in the new rules uses nature, extent and gravity to calculate a base penalty. The base penalty can be increased by up to 30% with an adjustment for circumstances, decreased by up to 10% for good faith and cooperation, and decreased by up to 10% for amounts voluntarily expended to mitigate the violation. The adjusted base penalty is multiplied by the days of violation to obtain a total adjusted penalty. The total adjusted penalty may be increased by up to 30% for a history of violation. The amount of the increase for history is determined by a percentage based upon the gravity of the historical violation. That percentage is multiplied by the adjusted base penalty to obtain the increase for history. The Department will calculate any economic benefit it determines the violator gained by delaying or avoiding the cost of compliance and add that amount to the total adjusted penalty. The Department may consider other matters as justice may require to further increase or decrease the penalty as appropriate.

Hearing Information: The Department recommends that the Board appoint a presiding officer and conduct a public hearing to take comment on the proposed amendments, repeals and new rules.

Board Options: The Board may:

1. Initiate rulemaking and issue the attached Notice of Public Hearing on Proposed Amendment, Repeal and Adoption;
2. Modify the Notice and initiate rulemaking; or
3. Determine that amendment, repeal and adoption of the rules is not appropriate and deny the Department's request to initiate rulemaking.

DEQ Recommendation: The Department recommends that the Board initiate rulemaking and appoint a presiding officer to conduct a public hearing, as described in the enclosed proposed Montana Administrative Register notice.

Enclosures:

1. Draft Notice of Public Hearing on Proposed Amendment, Repeal and Adoption.
2. Example penalty calculation for proposed new rules.